

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM BUFORD,

Petitioner,

Case No. 2:03-cv-02412 ALA (HC)

vs.

MATTHEW C. KRAMER,¹

ORDER

Respondent.

_____/

Pending before the Court are William Buford's ("Petitioner") application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(a) (doc. 1), Respondent's Answer (doc. 4), and Petitioner's Traverse (doc. 6). Also before the Court are the parties' replies to the Court's April 8, 2008 request for any relevant authority announced after filing of the Answer and Traverse. For the reasons discussed below, Petitioner's application is denied.

I

Petitioner was convicted by a Contra Costa County Superior Court jury of kidnapping for the purpose of robbery, while armed with a deadly weapon, and aggravated assault. He was sentenced to serve a term of seven years to life on the kidnapping for the purpose of robbery

¹Matthew C. Kramer is substituted for his predecessor, D-Butler, as the warden where the prisoner is incarcerated, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

1 crimes. The record shows that he and a crime partner conspired to induce a pair of real estate
2 agents to meet them at a residence listed for sale in order to kidnap and rob them. The victims, a
3 married couple drove from Dublin, California to Tracy to meet the feigned prospective buyers,
4 Petitioner and Jerry Sullivan. One of them identified himself as an attorney. After viewing the
5 property for ten minutes, Petitioner and his cohort left the residence. The victims locked up the
6 house and left by the rear door.

7 Petitioner and his crime partner forced the victims at gun point to get into a vehicle.
8 Petitioner and Sullivan demanded \$150,000. The victims stated they could not get that much
9 money. The female victim was instructed to go to a bank and withdraw the money to secure
10 their safety and freedom, while her husband remained in the automobile with a gun pointed at his
11 head. The female victim handed a bank teller a note requesting that the police be called. The
12 police responded. The crime partners drove off to escape being captured by pursuing law
13 enforcement officers. After a high-speed chase, the kidnappers' vehicle crashed into a tree. The
14 male victim was rescued unharmed.

15 II

16 On January 31, 2002, the BPT found that Petitioner was unsuitable for parole release
17 because "[t]he offense was carried out in a way that demonstrated an exceptionally callous
18 disregard for human suffering." Petitioner filed a petition for a writ of habeas corpus in the
19 Contra Costa County Superior Court. The Contra Costa County Superior Court denied his
20 petition on April 16, 2003. Its order reads as follows:

21 I. Background.

22 Petitioner is currently incarcerated in state prison. Petitioner is
23 before the court in habeas corpus to review the Board of Prison
24 Terms' (hereafter "BPT" or "Board") decision of 1-31-02 denying
petitioner parole for one year.

25 The underlying commitment was based on two counts of
26 kidnapping for robbery. Petitioner and a cohort enticed a pair of
realtors to show them a home. They subsequently kidnaped them
and drove them to a location, demanding \$150,000. When the

1 victims convinced them they could not pay that amount petitioner
2 and his partner took the victims to a bank where one of the victims
3 slipped the teller a note to call the police. A high speed chase
4 followed. Petitioner was subsequently apprehended. He was
5 sentenced in 1983 to seven years to life.

6 Petitioner has exhausted his administrative remedies.

7 II. Contentions in the Petition.

8 Petitioner contends 1.) that the Board violated his right to due
9 process when it failed to find him suitable for parole as there was
10 no evidence of unsuitability for parole introduced at the hearing;
11 2.) that the BPT failed to give substantial credit to the
12 psychologist's report and the counselor's report; and 3.) that the
13 BPT panel "adhere[d]" to the Governor's no parole policy.

14 III. Discussion.

15 The Court has carefully reviewed the transcript of the parole
16 hearing and the Board's decision, the attached 1999 Psychiatric
17 Report by Dr. Beermann, Counselor Flatt's Report and the sundry
18 additional exhibits attached to the petition.

19 The Board explicitly relied on the Report written by Counselor
20 Flatt and prepared for the parole hearing (Tx of 1-31-02 BPT
21 Hearing, p. 17) and the Psychological Report dated April 9, 2001
22 written by Dr. Beermann and incorporating a 1999 Report (*id.*, at
23 p. 20), also prepared for the hearing. Dr. Beermann's report
24 indicated that petitioner's risk factor (presumably to reoffend)
25 "does not pose more than normal risk factor whether in or out of a
26 controlled environment." (1999 Report, p. 3) Counselor Flatt's
Report, however, indicated that Flatt "believes that the prisoner
would pose a low degree of threat of society if released from
prison at this time." (June 2001 Report, last page.)

The Board, nonetheless, concluded that "the prisoner is not
suitable for parole and would pose an unreasonable risk of danger
to society and a threat to public safety if he was released from
prison. (Decision, p. 53: 8-12.) The Board found Dr. Beermann's
report "not an altogether bad report" but not a "glowing report."
(*Id.* p. 55.)

The Board's criteria for setting a parole date is set forth in title 15,
section 2401 of the California Code of Regulations: "A parole date
shall be denied if the prisoner is found unsuitable for parole under
section 2402(c)." According to that regulation, circumstances
tending to establish unsuitability for paroles are that the prisoner
committed the offense in an especially heinous, atrocious, or cruel
manner. Factors that support a finding that the prisoner committed
the offense in an especially heinous, atrocious, or cruel manner

1 include that the offense was carried out in a manner that
2 demonstrates an exceptionally callous disregard for human
suffering. (Cal. Code Regs., tit. 15, sec. 2402(c)(1).)

3 The regulations also provide for those circumstances tending to
4 establish suitability for parole. California Code of Regulations tit.
15, section 2402(d)(8) provides that the prisoner may be paroled if
5 he "has made realistic plans for release or has developed
marketable skills that can be put to use upon release."

6 At the hearing petitioner admitted the crime was cruel and uncalled
7 for. (Hearing, p. 51.) In its Decision the Board found the crime
was carried out in a way that demonstrates an exceptionally callous
8 disregard for human suffering. (Decision, p. 53.) The Board
found the motive for the crime was inexplicable or very trivial in
9 relationship to the offense. The crime included an armed
kidnaping and a high speed chase. Such actions would subject the
10 victims to an exceptionally callous degree of human suffering.

11 While the Board found petitioner to have made "suitable parole
plans" (Decision, p. 55), it did find that there were "some concerns
12 about his employment plans." (Id.) From the court's review of the
record, it would appear that petitioner has no marketable skills
13 whatsoever. He had little gainful employment before he entered
prison and did not complete any vocational training while in
14 prison. The only training petitioner undertook was in 1990 on
outdated equipment. In fact, as the Board noted, petitioner has no
15 letter offering him a job in the file. (Id.) Under these
circumstances and without a job the likelihood of recidivism are
16 simply too high to find petitioner a good candidate for parole.

17 A decision of the Board will be upheld if it is supported by some
evidence. (In re Rosenkrantz (2002) 29 Cal.4th 616.) The Board's
18 decision to deny parole was supported by some evidence. The
claim of due process violation, therefore, fails.

19 As to petitioner's final claim about the Governor's no parole
policy, that argument has been put to rest in In re Rosenkrantz,
20 supra.

21 In sum, the Board's decision was proper. Defendant committed
the underlying offense when he was 27 years old. The record
22 reflects that he engaged in little meaningful employment prior to
committing the offense. If released he has no marketable skills
23 and no job offer. Defendant never completed vocational training
courses while incarcerated. He remains a threat, albeit a "low"
24 threat, to society if released. Under the circumstances the risk of
reoffending is significant. The conclusion follows that petitioner
25 poses an unreasonable risk of danger to society and a threat to
public safety if he is released from prison.
26

IV. Disposition.

For the above stated reasons the petition for habeas corpus must be and now is denied.

Petitioner filed a petition for state habeas corpus relief in the California Court of Appeal, First Appellate District, Division Four. The Court of Appeal summarily denied the petition on May 8, 2003. Petitioner filed a petition for review of the decision of the Court of Appeal before the California Supreme Court. It was summarily denied on July 23, 2003.

In determining whether the California courts erred in holding that Petitioner failed to demonstrate that his federal constitutional rights had been violated, this Court must look to the Contra Costa Superior Court's decision as the last reasoned state court opinion addressing Petitioner's contentions. *Franklin v. Johnson*, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002). Petitioner filed a timely application for a writ of habeas corpus in this Court on September 18, 2003.

III

A

An application for a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment “shall not be granted with respect to any claim that was adjudicated on the merits” in state court unless the adjudication of the claim:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

B

Petitioner contends in his application for a writ of habeas corpus pursuant to § 2254(a)

1 that he is entitled to relief on five discrete grounds:

2 One. The BPT's denial of a parole release date violates the Fourteenth Amendment of
3 the United States Constitution because "[t]here is no evidence in the record to support the BPT's
4 finding of unsuitability. . . ."

5 Two. "The BPT panel failed to give substantial credit to both of the positive psychiatric
6 doctors and the prisoner counselor's reports, in violation of the 14th Due Process Clause of the
7 United States Constitution."

8 Three. The BPT adhered to the Governor's "no parole policy" in denying petitioner a
9 parole date, without making an individualized determination, thus violating Petitioner's right to
10 Due Process.

11 Four. "Petitioner's sentence is in excess of jurisdiction as a cruel and unusual
12 punishment" in violation of the Eight Amendment to the United States Constitution.

13 Five. Did the Superior Court's denial of Petitioner's habeas corpus application or
14 administrative board comport with due process of law"?

15 **C**

16 In his answer to Petitioner's application for a writ of habeas corpus, Respondent
17 maintains that a prisoner does not have a federally protected liberty interest in parole under
18 California Penal Code § 3041. This contention is contrary to the Ninth Circuit's decision in *Sass*
19 *v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127-28 (9th Cir. 2006). This Court must reject
20 Respondent's contention under compulsion of Ninth Circuit precedent that provides that
21 "California's parole scheme gives rise to a cognizable liberty interest in release on parole." *Id.*
22 at 1127 (citation omitted).

23 **D**

24 Respondent also argued in his answer that the some-evidence test announced in
25 *Superintendent v. Hill*, 472 U.S. 445 (1985) is only applicable to prison disciplinary proceedings.
26 Respondent maintains that the "some evidence" standard is not applicable when an inmate is

1 challenging a parole release decision because it is not based on clearly established federal law as
2 determined by the United States Supreme Court.

3 In *Hill*, the Supreme Court held that “revocation of good time does not comport with ‘the
4 minimum requirements of procedural due process,’ unless the findings of the prison disciplinary
5 board are supported by some evidence in the record.” (Citation omitted). This Court is bound
6 by the Ninth Circuit’s holding in *Sass* that the “some evidence” standard announced in *Hill*
7 applies to parole release proceedings. 461 F.3d at 1128-29.

8 “To determine whether the some evidence standard is met ‘does not require examination
9 of the entire record, independent assessment of the credibility of witnesses, or weighing of the
10 evidence. Instead, the relevant question is whether there is any evidence in the record that could
11 support the conclusion reached by the disciplinary board.’” *Id.* at 1128 (quoting *Hill*, 472 U.S. at
12 455-56). “*Hill*’s some evidence standard is minimal, and assures that ‘the record is not so devoid
13 of evidence that the findings of the disciplinary board were without support or otherwise
14 arbitrary.’” *Id.* at 1129 (quoting *Hill*, 472 U.S. at 457).

15 In *Irons v. Carey*, 505 F.3d 847, 853 (9th Cir. 2007) the Court held that

16 where, as here, there is some evidence to support a finding that
17 “the offense was carried out in a manner which demonstrates an
18 exceptionally callous disregard for human suffering” and the
19 “motive for the crime is inexplicable or very trivial in relation to
the offense,” Cal. Code Regs., tit. 15 § 2402(c)(1)(D)-(E), we
cannot say that the state court unreasonably applied *Hill*’s “some
evidence” principle.

20 In *Irons*, the record showed that the BPT relied on the commitment offense in determining that
21 the prisoner was not suitable for release on parole. *Id.* at 852.

22 The Ninth Circuit limited its holding in *Irons* as follows: “All we held in [*Sass*, 461 F.3d
23 at 1125 and *Biggs v. Terhune*, 334 F.3d 910, 912 (9th Cir. 2002)] and all we hold today, therefore,
24 is that, given the particular circumstances of the offenses of these cases, due process was not
25 violated when these prisoners were deemed unsuitable for parole prior to the expiration of their
26 minimum terms.” *Irons*, 505 F.3d at 853-54. In an unusual comment in *Irons*, the panel

expressed its aspiration that some future court decision will conclude that the BPT has the duty to grant parole where “there was substantial evidence in the record demonstrating rehabilitation.” *Id.* at 854.

The Court stated:

We hope that the Board will come to recognize that in some cases, indefinite detention based solely on an inmate’s commitment offense, regardless of the extent of his rehabilitation, will at some point violate due process, given the liberty interest in parole that flows from the relevant California statutes.

Id.

The *Irons* panel did not cite any authority to support its prognostication that the denial by the state court of habeas corpus relief, under such circumstances, would be “contrary to, or involve[] an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States” in violation of 28 U.S.C. § 2254(d)(1). No presently binding Ninth Circuit decision has fulfilled the prediction of the *Irons*’s panel.

In the precedential portion of the *Irons* decision, the Court held that “we must look to California law to determine the findings that are necessary to deem a prisoner unsuitable for parole, and then must review the record in order to determine whether the state court decision holding that these findings were supported by ‘some evidence.’” *Irons*, 505 F.3d at 851. Under California law, a prisoner is unsuitable for parole if:

- (1) the prisoner committed the offense in an especially heinous, atrocious, or cruel manner;
- (2) the prisoner has a previous record of violence;
- (3) the prisoner has an unstable social history;
- (4) the prisoner has committed sadistic sex offenses;
- (5) the prisoner has a history of mental or psychological problems; and
- (6) the prisoner has engaged in serious misconduct while in prison.

Cal. Code Regs., tit. 15 § 2402(c).

In its response to this Court’s April 8, 2008, request for supplemental briefing, Respondent again asserted that “[b]ecause the Supreme Court has not applied the some-evidence test to parole decisions a state court decision adjudicating a challenge to the denial of a parole

1 release date cannot be overturned based on a some-evidence analysis.” As noted above,
 2 according to the Ninth Circuit’s decision in *Sass*, the “some evidence” rule set forth in *Hill*
 3 governs parole denial claims. *Sass*, 461 F.3d at 1128-29. This Court must apply the law of this
 4 Circuit. *See Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987) (citation omitted)
 5 (“District courts are, of course, bound by the law of their own circuit and ‘are not to resolve splits
 6 between circuits no matter how egregiously in error they may feel their own circuit to be.’”).
 7 [Accordingly, this Court must determine whether “some evidence” supported BPT’s decisions in
 8 2002 and 2003 that Petitioner is not yet suitable for parole because he would “pose an
 9 unreasonable risk of danger to society if released from prison.” Code Regs., tit. 15 § 2402(c).

10 IV

11 The BPT’s January 31, 2002 decision reads as follows:

12 **PRESIDING COMMISSIONER WELCH:** Okay. The Panel
 13 reviewed all the information received from the public and relied on
 14 the following circumstances in concluding that the prisoner is not
 15 suitable for parole and would pose an unreasonable risk of danger
 16 to society and a threat to public safety if he was released from
 17 prison. The offense was carried out in an especially cruel and
 18 callous manner. Multiple victims were involved. The offense was
 19 carried out in way that demonstrates an exceptionally callous
 20 disregard for human suffering. The motive for the crime was
 21 inexplicable or very trivial in relationship to the offense. The
 22 conclusion was drawn from the Statement of Facts wherein on July
 23 2, 1982 Mr. Riley and his wife drove from their Dublin, California
 24 real estate office to Tracy. Mr. and Mrs. Riley had an appointment
 25 to meet prospective buyers. The bottom line is two men arrived,
 26 later identified as William Buford and Jerry Sullivan. The men
 came into the house and one of them identified themselves as an
 attorney. The men spent about 10 minutes looking around the
 house. When they left, Mr. and Mrs. Riley locked up the house and
 left by the rear door. Mr. Buford and Sullivan then forced the
 Rileys at gunpoint to get into the car and they demanded \$150,000
 to be delivered to the two men. And when the Rileys convinced
 them that they could not get that much money, Mrs. Riley was
 instructed to go to the bank and get the money while the husband
 remained in the car with the other two men. And thank God, Mrs.
 Riley was smart enough to give the bank teller a note and the two --
 The prisoner and his crime partner waited in the car with Mr. Riley,
 took off during the shooting. During the chase by police they
 crashed into a tree and subsequently the (inaudible) was rescued
 unharmed. The prisoner had a very minimal arrest history, a very

1 minimal juvenile history. The only thing that could be considered
2 an escalating pattern of behavior would be the arrest, I believe, for a
3 misdemeanor battery. And he did receive probation for that. So
4 therefore, you failed to profit from society's previous attempts to
5 correct his criminality. And that attempt was adult probation. The
6 psychiatric report dated 1-99 and an update was submitted also on
7 that same psychiatric report by Dr. Beermann. The update was
8 submitted on 4-9-01. It's not an altogether bad report in terms
9 being supported for release. The doctor writes, under assessment of
10 dangerousness, in my opinion Mr. Buford does not pose more than
11 a normal risk factor whether in or out of a controlled environment.
12 But it's not, on the other hand, it's not a negative report. But, on
13 the other hand, it's not a glowing report in terms of suitability for
14 release. Therefore, I'm going to recommend that a new psychiatric
15 report be completed for the next hearing that will be conducted in a
16 year. And the prisoner does appear to have suitable parole plans.
17 However, there are some concerns about his employment plans.
18 There is no letter offering him a job in the file. We found that in
19 response to 3042 Notices that the District Attorney from Contra
20 Costa county voiced an opposition to a finding of suitability. It's
21 also noted that in the file there was some issues raised last time
22 about the prisoner's participation in gang activity in BGF, or the
23 black Guerilla Family. After a lengthy review and the delay of this
24 hearing this morning in order to ascertain his involvement in it, the
25 family is convinced that the prisoner has not been involved in any
26 of this for the last six to seven years, that he's no longer a practicing
gang member. And that's validated in the file, that he's not a
participant. As to his degree of participation in the past, that's
debatable. However, the main thing is that you're not participating
now and that you haven't been participating for about six or seven
years. And the institution is convinced that you stopped
participating in all gang activity, and that's in your file. The
prisoner needs therapy in order to understand and cope with stress
in a nondestructive manner. Until progress is made the prisoner
continues to be unpredictable and a threat to others. Nevertheless,
the prisoner should be commended for remaining disciplinary free
for the time he's been incarcerated. He's only received one
disciplinary. He's no longer associated with gang activity, which
he should definitely be commended for that. However, the positive
aspects of your behavior do not outweigh the factors of
unsuitability. Parole is denied for one year. The Panel
recommends that you remain disciplinary free, if available, find
some new vocational skills, update them any way that you can.
Continue to participate in self-help programs and sooner or later,
hopefully sooner, I think if you continue to program in a positive
way you're going to have to receive a parole date in the not-too--
distant-future. But the day is not today, but we think you're on the
right track. Commissioner Weaver?

DEPUTY COMMISSIONER WEAVER: I would just echo what
was said about updating your vocational skills. There's been a lot

1 of EPA changes with regard to refrigerants and diesel emissions and
2 what not, and if that's what you plan on getting into to sustain
3 yourself you need to update so that, you know, you are ready to got
4 to work.

5 **INMATE BUFORD:** Okay.

6 **DEPUTY COMMISSIONER WEAVER:** I don't have anything
7 else, sir.

8 **PRESIDING COMMISSIONER WELCH:** This hearing is
9 concluded at 10:50.

10 **ATTORNEY SKIPPER-DOTTA:** Thank you.

11 **V**

12 **A**

13 Petitioner first argues that the BPT's denial of a parole release violated the Due Process
14 Clause of the Fourteenth Amendment of the United States Constitution because "[t]here is no
15 evidence in the record to support the BPT's finding of unsuitability... ." This contention
16 completely ignores the evidence of the cruel and callous manner in which Petitioner and his
17 accomplice planned to entice two real estate agents to leave their home or office, ostensibly to
18 show them a residence that was for sale. There Petitioner and his accomplice kidnapped their
19 victims and ordered them at gunpoint to deliver \$150,000 to them. While the male victim was
20 held in the Petitioner's vehicle with a gun pointed at this head, the female victim was ordered to
21 obtain the money from a bank. But for her daring decision to alert a bank employee that the
22 police should be summoned, she and her husband might have been murdered, after she returned
23 with the money, to prevent them from testifying against Petitioner and his co-conspirator. The
24 BPT did not err in concluding that the nature of Petitioner's infliction of this cruel and harrowing
25 treatment provided some evidence that Petitioner expressed a callous disregard for human
26 suffering and would pose a risk of danger to society if he were released on parole.

B

Petitioner also asserts that the BPT panel failed to give substantial credit to the positive
reports from a psychiatrist and a prison counselor considering Petitioner's suitability for release

1 on parole. The record shows that the BPT did consider these favorable reports about Petitioner's
2 conduct and performance behind prison walls, but concluded that Petitioner was unsuitable for
3 release from confinement because he "continues to be unpredictable and a threat to others." This
4 Court lacks the power to reweigh the evidence presented to the Board regarding Petitioner's
5 suitability for release on parole. *Sass* 461 F.3d 1128. Accordingly, Petitioner's contention that
6 the BPT failed to give substantial credit to the favorable reports must be rejected.

7 **C**

8 Petitioner further asserts that the BPT adhered to the Governor's "no parole policy"
9 without making an individualized determination of his suitability for parole. No evidence has
10 been offered by Petitioner that the BPT in the year 2003 adhered to a "no parole policy" for
11 persons serving life imprisonment because of the Governor's public statements. In support of this
12 contention, Petitioner relies on a report issued by the Legislative Analyst. That report does not
13 support Petitioner's argument. To the contrary, it indicates that in 1999, the BPT granted parole
14 on at least 18 occasions.

15 The report also states that "the Governor has indicated publicly that he objects to the
16 release of anyone who has committed murder." Petitioner was not convicted of murder.
17 Accordingly, this court must reject Petitioner's claim that he was not released on parole by the
18 BPT because of the Governor's opposition to releasing murderers on parole.

19 **D**

20 Petitioner also contends that his "sentence is in excess of jurisdiction as a cruel and
21 unusual punishment "in violation of the Eighth Amendment to the United States Constitution. He
22 has failed to cite any decision of the United States Supreme Court that holds that, an
23 indeterminate sentence, such as one setting the length of imprisonment at seven years to life
24 violates the Eighth Amendment. As noted by the Respondent, the Supreme Court in *Harmelin v.*
25 *Michigan*, 501 U.S. 957 (1991), concluded that a sentence of life imprisonment without the
26 possibility of parole for the sale of 672 grams of cocaine was not so grossly disproportional as to

1 violate the Eighth Amendment. *Id.* at 994-995. Here, Petitioner was sentenced to seven years to
2 life under the indeterminate sentence law with the possibility of parole when the BPT determined
3 that he no longer is a danger to society. Under California Indeterminate Sentence Law, the BPT
4 is not required to set a parole date for a person convicted of kidnapping for the purpose of robbery
5 until he or she is found suitable for parole. See *In re Stanworth*, 33 Cal. 3d 176, 183 (1982). The
6 BPT's decision that Petitioner is not yet suitable for release on parole did not violate the Eighth
7 Amendment.

8 **E**

9
10 Finally, Petitioner maintains that the Contra Costa County Superior Court erred in
11 concluding that some evidence supported the BPT's decision to set his parole release date. Thus,
12 contention merely rehearses each of the arguments set forth above. None are meritorious.

13 **Conclusion**

14 The BPT decided not to set a release date because it concluded that the evidence of the
15 cruel nature of Petitioner's crimes continues to pose a risk of danger to society if he were set free.
16 This finding outweighs the fact that he has performed well while confined under twenty-four hour
17 control by prison guards. Thus, the BPT's decision was supported by some evidence.

18 Therefore, it is hereby ORDERED that Petitioner's application for habeas corpus relief is
19 DENIED.

20 /////

21 DATED: June 10, 2008

22 /s/ Arthur L. Alarcón
23 UNITED STATES CIRCUIT JUDGE
24 Sitting by Designation
25
26